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No. 07-1216

In The
Supreme Court of the United States

PHILIP MORRIS USA, INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF THE OREGON TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF THE OREGON TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The Oregon Trial Lawyers Association ("OTLA") respectfully submits this Amicus Curiae brief in support of Respondent. Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this Amicus Curiae brief.[1]

INTEREST OF AMICUS CURIAE

OTLA is a statewide, non-profit association of approximately 700 attorneys who qualify for membership through a commitment to the principles of fundamental fairness, trial by jury and the civil justice system and by primarily representing plaintiffs in cases involving personal injury, civil rights, employment, workers' compensation and business tort litigation. One of the objectives of OTLA, as stated in its Constitution, Article II, is "especially to advance the cause of those who are damaged in

[1] Letters evidencing the parties' consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least ten days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

person or property and who must seek redress therefore."

The purpose of this amicus brief is to provide context for this Court to assess the Petitioner's assertion that the Oregon Supreme Court applied a procedural rule that "is neither firmly established nor regularly followed." OTLA urges this Court to continue to respect the right of state courts to enforce well-established rules of procedure that serve "the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions." *See Osborne v. Ohio,* 495 U.S. 103, 123 (1990).

SUMMARY OF THE ARGUMENT

For nearly a century, the Oregon Supreme Court has repeatedly and consistently enforced the rule that refusal to give a requested instruction is not error if the proposed instruction is incorrect in any respect. The court predictably followed that rule in carrying out this Court's remand instruction to consider whether the trial court's refusal to give Petitioner's Proposed Jury Instruction Number 34 required a new trial. Petitioner's allegation that the rule was merely "a pretext" invoked by the Oregon Supreme Court "in order to evade this Court's directions" misinterprets Oregon law and falsely impugns the integrity of the Oregon court.

ARGUMENT

I. The Procedural Rule Enforced Below by the Oregon Supreme Court Is Well-Established and Regularly Followed.

The Oregon Supreme Court long ago put Oregon lawyers on notice that it is the responsibility of the parties – not of the trial judge – to correctly fashion desired jury instructions. In *Sorenson v. Kribs,* 161 P. 405, 409 (1916), the appellant had requested a jury instruction that "may have been technically incorrect," and contended that the requesting of a jury instruction on an issue that was properly a matter for instruction imposed a duty on the trial court "so to modify the language suggested as correctly to state the law applicable to the issue involved." The Oregon Supreme Court rejected the argument, adopting, instead, the position it found to be supported by the "great weight of authority":

> "In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. **If the instruction, as requested, is objectionable in any respect, its refusal is not error**." (quoting *1 Blashfield's Ins. to Juries* (2d Ed.) § 175, p. 402) (emphasis added).

Throughout the ensuing nine decades, the Oregon Supreme Court continued to remind members of the Oregon bar that they bear the sole responsibility

for crafting accurate jury instructions, and indeed to emphasize that adding a single inaccurate proposition to a proposed instruction that contains other, accurate statements of the law will taint the entire instruction. *See, e.g., Samchuck v. Insurance Co. of North America,* 179 P. 257, 260 (1919) ("In a long instruction like this one the court is not required to separate the good from the bad. It is well settled that before error can be based upon the refusal of an instruction, the whole instruction, as applied to the case, must be good law and accurately stated."); *Naftzger v. Henneman,* 185 P. 233, 235 (1919) ("[W]here a requested instruction contains an erroneous proposition, the court is not bound to separate the chaff from the wheat, and give that part of the request which states the law correctly."); *Forrester v. Hauser Const. Co.,* 240 P. 873, 876 (1925) (no error in trial court's refusal to give a requested instruction that combined a proper statement of the law with another statement that was erroneous); *Diller v. Riverview Dairy,* 288 P. 401, 403 (1930) ("[E]rror cannot be predicated, aside from any rule of court, upon the refusal to give an instruction which does not clearly, concisely, and accurately cover the point in issue."); *Alt v. Krebs,* 88 P.2d 804, 806 (1939) (Trial court did not err in refusing to give instruction that correctly stated the law but "would likely have caused confusion" because "[e]rror cannot be predicated upon the refusal to give an instruction which does not clearly, concisely and accurately cover the point in issue."); *Hotelling v. Walther,* 148 P.2d 933, 935 (1944) (reiterating that Oregon rule is that recited in *Sorenson*: "In order to

entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error."); *Schultz v. Shirley,* 220 P.2d 86, 88 (1950) (The plaintiff's requested instruction "includes three different propositions, and if any one of them is improper or unwarranted under the law, the trial court is not required to segregate the wheat from the chaff and give the portion of the instruction that is proper."); *Denton v. Arnstein,* 250 P.2d 407, 417 (1952) ("The trial court may properly refuse a requested charge which is unintelligible, incomplete, or argumentative, or which might prove misleading or confusing to the jury."); *Wiebe v. Seely,* 335 P.2d 379, 393 (1959) ("[I]t is well settled that if a requested instruction is not altogether free from fault, the court need not give it."); *Ballou v. Blitz-Weinhard Co.,* 424 P.2d 225, 227 (1967) ("We need not cite authorities for the proposition that the court is not required to give a requested instruction if its substance, . . . is not free from fault."); *McCaffrey v. Glendale Acres*, 440 P.2d 219, 222 (1968) ("In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error." (quoting *Hotelling v. Walther*, 148 P.2d at 935)); *Brooks v. Bergholm,* 470 P.2d 154, 158 (1970)

(no error in trial court's refusal to give an instruction on a point of law on which the defendant "was entitled to an instruction . . . if properly requested" because "the instruction in the form in which it was requested was not free from fault"); *Owings v. Rose,* 497 P.2d 1183, 1188 (1972) ("The trial court is not obliged to give an incorrect instruction, or to give the correct portions of one which includes errors."); *Beglau v. Albertus,* 536 P.2d 1251, 1256 (1975) ("It is fundamental that a request for an instruction may properly be denied, without error, unless the requested instruction is clear and correct in all respects, both in form and in substance, and unless it is altogether free from error"); *Hernandez v. Barbo Machinery Co.,* 957 P.2d 147, 151 (1998) (The trial court does not err in refusing to give a requested instruction "if the requested instruction is not correct in all respects."); *Bennett v. Farmers Ins. Co. of Oregon,* 26 P.3d 785, 795 (2001) ("However, the failure to give a requested instruction is not error if the requested instruction was not correct in all respects.")

The rule that trial counsel must offer instructions that are correct in all respects is procedural and neutral; it applies equally to plaintiffs and defendants, individuals and corporations, criminal and civil. *See State v. Reyes-Camarena*, 7 P.3d 522, 528 (2000) ("Because defendant's requested sympathy instruction, considered in its entirety, did not state the law correctly in all respects, the trial court did not err in refusing to give that sympathy instruction regardless of whether the instruction was correct in

part."); *State v. Quartier*, 247 P. 783, 784 (1926) ("A requested instruction is always properly refused, unless it ought to have been given in the very terms in which it was proposed.")

II. The rule of *Sorenson* is the only standard by which the Oregon Supreme Court evaluates challenges to the refusal of a particular jury instruction.

Petitioner, and amici supporting it, criticize the Oregon Supreme Court for holding petitioner to the requirement that a requested jury instruction must be correct in all respects rather than copying the holding of its decision in *State v. George*, 97 P.3d 656, 661 (2004). According to Petitioner, "the Oregon courts had long held that there is no need for counsel to re-submit a proposed instruction in 'completely correct' form if it is clear that such a submission would be rejected in any event," citing *George*. (Brief for the Petitioner at 13). That is not a correct statement of Oregon law. Although the defendant in *George* also proposed an instruction that the Oregon Supreme Court concluded failed to convey "a correct overall impression" of the law, that is where the analogy to the case at bar ends. In *George,* an Oregon statute required that, when a criminal defendant raises an insanity defense, the trial court "shall instruct the jury" regarding the statutory consequences for the defendant of a verdict of guilty except for insanity. 97 P.3d at 657. The trial court had refused to give the defendant's requested instruction on

this point of law **or** the Oregon Uniform Criminal Jury Instruction on the point of law because it believed it could not "give **any** instruction regarding the consequences of a finding of guilty except for insanity." *Id.* at 658 (emphasis in original). On appeal, the Oregon Supreme Court emphasized that the defendant was challenging the trial court's failure to give "**some** instruction that comported with" the statutory requirement; not just challenging the refusal of his proposed instruction. *Id.* at 660 (emphasis in original). *George* gives two reasons for excusing the defendant from the requirement of a completely correct instruction that the court said it "ordinarily" imposes on parties complaining about instructional error. The court's primary reason was the fact that the statute "unequivocally places the responsibility for giving the required instruction on the trial court, without regard to whether the defendant wants or requests such an instruction, much less offers one that is a correct statement of the law." *Id.* at 661.

Petitioner focuses exclusively on the secondary distinction offered by the court – the "futility" of proposing a correctly worded instruction when the trial court had refused to give even the uniform instruction on the point of law. But this comment has meaning only in the context of the unique error at issue in *George.* The decision of the trial court in *George* was reversed because the court erred in failing to give **any** instruction on a mandated topic of instruction. *Id.* at 662. That is not Petitioner's argument, here. Petitioner has raised only the more

narrow challenge on which the *George* defendant was **not** successful, *i.e.,* whether the trial court erred in refusing a specific proposed instruction. *See Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1061 (2007) (describing argument of Petitioner, when this case was before the Oregon Supreme Court the first time, as whether "the trial court should have accepted" Petitioner's proposed instruction); *Williams v. Philip Morris, Inc.,* 176 P.3d 1255, 1260 (2008) ("Under the Supreme Court's remand, then, it is our task to apply the constitutional standard set by the Supreme Court in our consideration of the sole issue raised by Philip Morris, *viz.,* whether the trial court erred in refusing to give proposed jury instruction No. 34.") Given the nature of Petitioner's claim of instructional error, the Oregon Supreme Court predictably applied its long-standing rule that error cannot be based upon the refusal of a specific instruction unless the requested instruction was correct in all respects.

III. Oregon Attorney Practice Aids Carefully Warn of this Procedural Requirement.

Not surprisingly, the practice aids available to Oregon lawyers consistently admonish trial attorneys to draft jury instructions that are correct in all respects. The Oregon State Bar Association publishes a variety of practice aids for Oregon attorneys that fully advise of the risk inherent in adding incorrect or misleading statements to a desired instruction. For example, the Oregon State Bar manual on Civil Pleading and Practice cautions:

> Nonuniform instructions that contain both proper and improper statements of the law are properly denied. The court is not required to give an incorrect instruction or to correct or edit the portions of an instruction that are in error or inapplicable. *Beglau v. Albertus*, 272 Or 170, 179, 536 P2d 1251 (1975); *Owings v. Rose*, 262 Or 247, 258, 497 P2d 1183 (1972); *Bremner v. Charles*, 123 Or App 95, 108, 859 P2d 1148 (1993); *Winnett v. City of Portland*, 118 Or App 437, 447, 847 P2d 902 (1993). A requested instruction is properly refused 'unless it ought to have been given in the very terms in which it was proposed.' *State v. Francis*, 284 Or 621, 626, 588 P2d 611 (1978); *Propp v. Long*, 129 Or App 273, 278, 879 P2d 187 (1994). In other words, if a trial court refuses to give a requested instruction, 'there is no error if the requested instruction is not correct in all respects.' *Hernandez v. Barbo Machinery Co.*, 327 Or 99, 106, 957 P2d 147 (1998). *See Hall v. The May Dept. Stores Co.*, 292 Or 131, 143, 637 P2d 126 (1981).

2 Oregon Civil Pleading and Practice (Oregon CLE 2006), § 39.7, p. 39-9.

Of particular relevance is a Practice Tip included among the advice to practitioners in the publication quoted above:

> PRACTICE TIP: The lawyer should separate complex instructions into several consecutive instructions with just one main point of law contained in each instruction.

> This practice will reduce the likelihood that the trial court will reject an entire multifaceted special instruction.

Id.

The same advice is given to Oregon criminal practitioners in the *Criminal Law* manual:

> A lawyer should keep in mind that the refusal to give a requested instruction is not error unless the instruction is correct in all respects. *State v. Montez,* 309 Or 564, 600, 612-13, 789 P2d 1352 (1990). If a proposed instruction is flawed, the trial court does not err in refusing to give it. *State v. Francis,* 284 Or 621, 626, 588 P2d 611 (1978).
>
> PRACTICE TIP: To avoid the rule of *Francis, supra,* it may be best to offer multiple alternative short requested instructions that deal with a single point and that are not argumentative or biased.

2 Criminal Law (Oregon CLE 2005), § 20.77, p. 20-53.

Another practice aid, the *Oregon Civil Litigation Manual* warns:

> Error [for a requested instruction refused] is preserved, however only if the requested instruction was correct in all respects. *Bennett v. Farmers Ins. Co.*, 332 Or 138, 153, 26 P3d 785 (2001). When a party's proposed instructions state the law inaccurately, the court has no duty to correct or edit the instruction, and it does not commit an error by refusing

> to give the jury the entire instruction. *Winnett v. City of Portland*, 118 Or App 437, 447, 847 P2d 902 (1993).

2 Oregon Civil Litigation Manual (Oregon CLE 2004), Appendix 32C, p. 32-114.

And the manual with which virtually every trial lawyer starts when creating a list of proposed jury instructions, *Oregon Uniform Civil Jury Instructions,* reminds practitioners in its Introduction:

> The general law governing jury instructions was set forth in *Williams v. Portland Gen. Elec.*, 195 Or 597, 610, 247 P2d 494 (1952):
>
> > "The parties to any jury case are entitled to have the jury instructed in the law which governs the case in plain, clear, simple language. The objective of the mold, framework and language of the instructions should be to enlighten and acquaint the jury with the applicable law. Everything which is reasonably capable of confusing or misleading the jury should be avoided. Instructions which mislead or confuse are grounds for a reversal or a new trial."

Uniform Civil Jury Instructions (Oregon CLE 2007), p. xi.

The rule is one with which appellate lawyers are, necessarily, well versed as well. The compendium of

case law in Oregon's *Appeal and Review* manual cites only one case to describe the standard the appellate courts apply in reviewing a claim of error based on the failure to give a requested instruction:

> *See Hernandez v. Barbo Machinery Co.* 327 Or 99, 106, 957 P2d 147 (1998) (court evaluates propriety of proposed jury instruction as a whole; if it would be error to give any part of proposed instruction, court does not err in refusing to give instruction).

Appeal and Review (Oregon CLE 1993 & Supp. 2002), §14.74, p. 14-36.

Once the Oregon Supreme Court determined that Petitioner had included in its Proposed Jury Instruction Number 34 statements that were legally incorrect and would have been misleading to the jury, it predictably applied the well established procedural rule adopted in *Sorenson,* and held that there was no error in the refusal of that requested instruction. Given the absence of any *George*-type argument by Petitioner about a spontaneous trial court duty to give some instruction on the harm-to-others concept, the only outcome on remand that would have been surprising or unprecedented would have been a decision by the Oregon Supreme Court that ignored Petitioner's failure to craft an instruction that was correct in all respects.

CONCLUSION

For the foregoing reasons, and for the reasons presented by the Respondent, the judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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